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NCLA Amicus Brief Takes on SEC’s Arbitrary Calculations of Civil Penalties in Enforcement Cases

Securities and Exchange Commission v. Jocelyn M. Murphy, et al.

Washington, DC (November 30, 2022) –The Securities and Exchange Commission (SEC) recently [announced](#) record-breaking enforcement results, boasting a staggering \$4.2 *billion* in civil penalties imposed during just the past fiscal year—the agency’s “highest on record.” It did so by using putatively “civil” law enforcement powers to seek and impose severe financial penalties—calculated using arbitrary and inconsistent multipliers—against American citizens without due process and procedural protections. The New Civil Liberties Alliance has challenged this questionable practice in an [amicus brief](#) filed supporting rehearing *en banc* in *SEC v. Jocelyn M. Murphy, et al.* NCLA argues the full Ninth Circuit has an excellent opportunity to bring desperately needed consistency, clarity, and discipline to the calculation of civil penalties in enforcement cases prosecuted by SEC.

Congress has not changed SEC’s baseline statutory penalty limits since adopting them in 1990, yet the magnitude of the agency’s penalties has expanded dramatically in recent decades. The \$4.2 billion record in civil penalties was more than triple SEC’s average annual penalty totals over its preceding five fiscal years. Today’s SEC penalties are often impossible to square with the statutory penalty caps legislated by Congress. As the *Murphy* case demonstrates, SEC uses several tricks to artificially inflate penalties and evade statutory penalty caps, including arbitrarily slicing violations into smaller units and demanding a maximum penalty for each piece.

SEC requested civil penalties for each allegedly misleading communication made by Defendant Murphy *and* for each month that Defendants Michael Murphy and Richard Gounaud traded securities without proper registration as broker-dealers, for total requested penalties of \$1.7 million (21 communications), \$523,863 (65 months) and \$385,641 (46 months), respectively. But the statutory text does not support the district court’s penalty multipliers. It only authorizes relatively modest penalties assessed “[f]or each violation”—*not* for each communication sent in connection with a violation and *not* for each random unit of time a defendant was in violation. Indeed, the unit-of-time multiplier is especially arbitrary and limitless. By its logic, the violation-slicing could be even thinner, such that each week, day, or hour without proper registration could theoretically be treated as a separate violation.

Despite legislating in this area on several occasions, Congress has not provided any intelligible principles to guide the SEC or the courts in determining how to calculate the number of violations in any given case—a critical input in determining (and limiting) the magnitude of any potential penalty. When agencies are allowed to determine sentences by recharacterizing violations in arbitrary ways, that takes away Congress’s power to define crimes and establish available sentences. In this case, the violations not only were sliced more thinly than

the applicable statutes can bear, but the slicing was completely haphazard and inconsistent, resulting in egregiously inflated and disproportionate penalties that the Ninth Circuit should reverse and remand.

NCLA released the following statement:

“For far too long, agencies like the SEC have routinely sidestepped penalty caps legislated by Congress, using gimmicks like arbitrarily slicing violations into numerous pieces and demanding a separate maximum penalty for each little piece. The resulting eye-popping penalties make for great headlines and feature prominently in agency budget requests, but they are often excessive to the point of lawlessness. This case gives the full Ninth Circuit an excellent opportunity to bring order and discipline to these runaway penalties.”

— **Russ Ryan, Senior Litigation Counsel, NCLA**

For more information visit the *amicus* page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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